Filed 12/29/15 P. v. Freedheim CA1/5

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>SCOTT DOUGLAS FREEDHEIM,<br>Defendant and Appellant. | A144665<br><br>(Sonoma County<br>Super. Ct. No. SCR-642673) |

Defendant and appellant Scott Douglas Freedheim appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.18.[1] We affirm.

BACKGROUND

In May 2014, appellant was sentenced following his no contest plea to felony forgery of a prescription to obtain a narcotic drug (Health & Saf. Code, § 11368) and second degree burglary (§§ 459, 460, subd. (b)). According to the preliminary hearing testimony, appellant entered two drugstores and unsuccessfully attempted to fill a forged prescription for Oxycodone.

In December 2014, appellant filed a petition for resentencing under section 1170.18. The People opposed the petition on the ground that the Health and Safety Code section 11368 conviction was not eligible for relief and the section 459 conviction was

[1] All undesignated section references are to the Penal Code.

not eligible for relief because appellant attempted to obtain the prescription "by fraud, not theft." The trial court denied the petition.

DISCUSSION

In November 2014, California voters enacted Proposition 47, which "created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1092.) Section 1170.18, subdivision (a), enumerates the statutes added or amended by Proposition 47.

I. *Health and Safety Code section 11368*

As appellant acknowledges, Health and Safety Code section 11368 is not among the statutes enumerated in section 1170.18, subdivision (a). Appellant argues that, regardless, we should construe Proposition 47 liberally to include Health and Safety Code section 11368 because, according to appellant, it is essentially a combination of two offenses made misdemeanors by Proposition 47: forgery and drug possession. We disagree.

"The basic rules of statutory construction are well established. 'When construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body.' [Citation.] ' "We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. . . ." [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.' " (*People v. King* (2006) 38 Cal.4th 617, 622 (*King*).) "In interpreting a voter initiative . . . , we apply the same principles that govern the construction of a statute." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.)[2]

[2] These rules of statutory construction were not altered by *Horwich v. Superior Court* (1999) 21 Cal.4th 272, relied on by appellant. While that case examined the intent underlying a voter initiative to construe its provisions, it did so in the face of ambiguous language. (*Id.* at p. 277 [finding the relevant language " 'not pellucid' " and "subject to

Health and Safety Code section 11368 provides: "Every person who forges or alters a prescription or who issues or utters an altered prescription, or who issues or utters a prescription bearing a forged or fictitious signature for any narcotic drug, or who obtains any narcotic drug by any forged, fictitious, or altered prescription, or who has in possession any narcotic drug secured by a forged, fictitious, or altered prescription, shall be punished by imprisonment in the county jail for not less than six months nor more than one year, or in the state prison." By its plain and unambiguous terms, a conviction under this statute can be sentenced as either a felony or misdemeanor. Section 1170.18, subdivision (a), by *its* plain and unambiguous terms, has no impact on Health and Safety Code section 11368. Because the plain language of these statutes is clear, we have no occasion to consider the purpose or legislative history of Proposition 47. (*King, supra,* 38 Cal.4th at p. 622 [" 'If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.' "].)

II. *Section 459*

Appellant contends his burglary conviction (§ 459) falls within the definition of shoplifting, a misdemeanor offense pursuant to Proposition 47 (§ 459.5). We disagree.

Section 459 provides, in relevant part: "Every person who enters any . . . store . . . *with intent to commit grand or petit larceny or any felony* is guilty of burglary." (Italics added.) As appellant acknowledged in the trial court, the felony supporting his conviction under this provision was a felony violation of Health and Safety Code section 11368. Section 459.5, subdivision (a), provides shoplifting is a misdemeanor offense, with certain exceptions not relevant here, and defines shoplifting as "entering a commercial establishment *with intent to commit larceny* while that establishment is open

---

different interpretations"].) Also unavailing is appellant's reference to uncodified language directing Proposition 47 be "liberally construed to effectuate its purposes." (Prop. 47, § 18.) " '[L]iberal construction cannot overcome the plain language of [a voter initiative] . . . .' [Citation.] As a rule, a command that a constitutional provision or a statute be liberally construed 'does not license either enlargement or restriction of its evident meaning.' " (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844.)

during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (Italics added.)

Appellant contends his conviction falls within the definition of shoplifting because "[f]orgery is simply the means by which the theft is committed." Larceny requires a taking of property "with the specific intent to steal, i.e., to appropriate property of another and permanently deprive that person of possession. Unless this is proved there is no larceny." (2 Witkin, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 23, p. 47.) A violation of Health and Safety Code section 11368, however, does not require an intent to steal.[3] The crime is not a property crime—"no person [i]s defrauded"—but rather is a crime "against the state and consists of obtaining the narcotic by means of the false writing." (*People v. Katz* (1962) 207 Cal.App.2d 739, 747 (*Katz*).)[4] "[Health and Safety Code] section 11368 . . . . is primarily directed at forgery of the indicia of a powerful authority solely reserved to statutorily defined 'practitioners.' [Citations.] Prescriptions are devices by which physicians and other authorized practitioners work to achieve legitimate medical purposes. [Citation.] The protection of the health and safety of the public in obtaining medical prescriptions is critical. [Citation.] Physicians, pharmacists, and patients must be able to rely on the integrity of the system. [Health and Safety Code s]ection 11368 is aimed at helping preserve that integrity by prohibiting counterfeiting of a physician's authority to prescribe, deceiving of the pharmacist, corrupting the public's legitimate supply of medicine, and, potentially, defrauding of insurance companies or government programs." (*People v. Wheeler* (2005) 127 Cal.App.4th 873, 880 (*Wheeler*).)

---

[3] There is no evidence appellant did not intend to pay for the prescription, had it been filled.

[4] *Katz* construed Health and Safety Code former section 11715, which contained language identical to current section 11368 with the exception of the prescribed sentence and a few minor nonsubstantive changes. (Deering's Ann. Health & Saf. Code, § 11715 (1961 ed.) pp. 792–793.)

The intent to commit a felony violation of Health and Safety Code section 11368 can serve as the "other felony" underlying a conviction for burglary pursuant to section 459. However, shoplifting as defined in section 459.5 is limited to persons with the "intent to commit larceny." (§ 459.5.) A violation of Health and Safety Code section 11368 does not constitute larceny.[5] Appellant's burglary conviction is not eligible for resentencing pursuant to section 459.5.

III. *Equal Protection*

Appellant's final argument is the trial court's ruling denied his right to equal protection because his crimes are akin to the following crimes made misdemeanors under Proposition 47: forgery (§ 473, subd. (b)), petty theft (§ 490.2), and drug possession (Health & Saf. Code, §§ 11350, subd. (a), 11357, subd. (a), 11377, subd. (a)). Appellant failed to raise this argument below but contends any forfeiture constituted ineffective assistance of counsel. We reject the argument as meritless.

Appellant has not demonstrated strict or intermediate scrutiny is warranted for equal protection purposes. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 [a criminal defendant " 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives' "].) "Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' [Citations.] 'This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. . . .' [Citation.] To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-

[5] Because of this conclusion, we need not decide the People's alternative argument that appellant failed to prove the value of the property at issue was less than $950.

guess its ‘ “wisdom, fairness, or logic.” ’ ” (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*).)

As discussed above, Health and Safety Code section 11358 is designed to protect “the health and safety of the public in obtaining medical prescriptions.” (*Wheeler, supra,* 127 Cal.App.4th at p. 880.) In contrast, forgeries eligible for misdemeanor sentencing pursuant to Proposition 47 are limited to those “relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order” where the value is less than $950 (§ 473, subd. (a))—in other words, forgeries involving theft. Misdemeanor petty theft involves “obtaining any property by theft” where the value is less than $950. (§ 490.2.) It is not irrational for the Legislature to consider minor theft crimes worthy of lighter punishment than a crime that undermines the public’s health and safety. (*Johnson, supra,* 60 Cal.4th at p. 881.)

Similarly, Health and Safety Code section 11368 is not akin to drug possession. Because of the public health and safety concerns underlying the statute, “[f]ar more is implicated [in Health and Safety Code section 11368] than just an offender’s personal involvement with drugs.” (*Wheeler, supra,* 127 Cal.App.4th at p. 880.) Appellant has failed to “ ‘ “negative every conceivable basis” ’ that might support the disputed statutory disparity” (*Johnson, supra,* 60 Cal.4th at p. 881) between the punishments for Health and Safety Code section 11368 and for misdemeanor drug possession.

DISPOSITION

The order is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A144665)